A

THOMAS KANDADI

v.

PP

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: K42(A)-14-2008]
30 DECEMBER 2008

C ***CRIMINAL LAW:*** *Anti Corruption Act 1997 - Sections 15 and 16 - Offence of using position for gratification - Allegation of - Whether appellant's act of signing the LPO for purpose of obtaining gratification - Cheque of RM9,995 allegedly cashed by the appellant - Whether proved - Whether nexus established between the cheque of RM9,995 and abuse* D *of position - Doubt on identity of person who cashed the said cheque - Whether resolved in favour of appellant - Whether there was a prima facie case against appellant - Anti Corruption Act 1997, s. 42(1)*

E The appellant, a public officer with the Beaufort Health Department, was charged for receiving a bribe of RM9,995 from a company, AST Enterprise, an offence punishable under s. 15 Anti Corruption Act 1997 and punishable under s. 16 of the same Act. He claimed trial and was found guilty by the Sessions Court Judge and sentenced to two years' imprisonment and a fine in F default six months' imprisonment. Briefly, at the end of 2003, Klinik Kesihatan Meligan Sipitang which came under the jurisdiction of the Beaufort Health Department applied for allocation to carry out repair and maintenance works for the fence at the Klinik ('the project'). By a unanimous decision of the G Quotation Committee at the Beaufort Health Department ('the Quotation Committee'), the project was awarded to AST Enterprise. Pursuant to the decision of the Quotation Committee, the appellant, as chief clerk of the said department, on 22 December 2003, signed the 'Perakuan' column of Local H Purchase Order No. G659084 ('the LPO') to certify that repair works for the fence had been satisfactorily carried out. This was untrue as the project had not been completed. There was no dispute that when the appellant signed the LPO he had done so under the instruction of PW19 (the Head of Department). I However, the prosecution submitted that three months after the appellant signed the said LPO, the appellant had received a RM9,995 cheque from PW20 (the owner of the said company)

which he allegedly cashed on 21 April 2004. The question arose as to whether the appellant had used his position for a gratification when he signed the said LPO and whether there was an abuse of position. The three elements of the offence which the prosecution must prove beyond reasonable doubt against the appellant were, namely: (i) that the appellant was an officer of a public body at the material time; (ii) that he had used his position to obtain a gratification from AST Enterprise and (iii) that he received the gratification from AST Enterprise.

Held (setting aside conviction: acquitting and discharging the appellant):

(1) There was sufficient proof that the appellant was a public officer attached to the Beaufort Health Department at the material time. The offence under s. 15(1) of the Act is only committed when there is misuse or abuse of position and not otherwise. The evidence must show that the appellant's intention when he signed the LPO was to obtain a gratification from AST Enterprise. However, when the appellant signed the LPO, it was to follow up on the decision of the Quotation Committee and under the instruction of PW19. On such facts, it could not be said that the appellant's act of signing the LPO was for the purpose of obtaining a gratification. (para 7)

(2) As the Chief Clerk at the Beaufort Health Department, it was the appellant's duty to certify the 'PERAKUAN' column of the LPO after the decision was made by the Quotation Committee that payment must be made to the contractor. A subordinate officer should not be exposed to criminal action for carrying out the lawful orders of his superior. This could not have been the intention of Parliament in enacting s. 15(1) of the Act. The Sessions Judge's conclusion that the appellant's intention was to obtain a gratification was obviously swayed by evidence of the appellant's subsequent conduct in receiving the RM9,995 cheque from PW20 in April 2004. But before criminal intent can be attributed to the appellant there must first be established a nexus between the RM9,995 and his alleged abuse of position. It must be proved that at the time the appellant signed the LPO, it was agreed that he would be given RM9,995. In absence of such evidence there could be no question of any criminal nexus between the RM9,995 cheque and the appellant's act of signing the LPO. (para 12)

(3) The appellant could not have had any personal interest as the decision to award the contract to AST Enterprise was not his decision. What was more damaging to the prosecution's case was PW20's admission that he had no knowledge about the project, did not know the appellant and had never bribed anyone to get payment for the project. This evidence effectively rebutted the presumption of corrupt motive under s. 42(1) of the Act without having to call upon the appellant to discharge the burden placed on him by that section. The implication of PW20's admission was that the appellant was not actuated by corrupt motive when he signed the LPO. PW20's evidence must be the truth because there was absolutely no evidence that before the appellant signed the LPO he had any dealings or discussed the project with PW20. (para 13)

(4) It was the evidence of a bank officer (PW13) that it was the appellant who had cashed the said cheque on 21 April 2004. He had come to this conclusion based on the name, identification card number and the signature appearing at the back of the cheque given to him. The Sessions Judge was wrong in finding that it was the appellant who produced the identity card, signed at the back of the cheque and cashed the cheque. In so finding, the Sessions Judge had accepted the evidence of PW13 without appreciating that PW13 was relying on a document and not on visual identification to identify the appellant as the person who cashed the cheque. The doubt on the identity of the person who cashed the RM9,995 cheque raised a doubt as to whether it was actually given to him. This doubt must be resolved in favour of the appellant. The Sessions Judge was wrong in finding that the prosecution had established a *prima facie* case against the appellant. (paras 18 & 19)

Legislation referred to:

Anti Corruption Act 1997, ss. 2, 11(a), 15(1), (2), 42(1), 44(1)(a)(ii), (iii)

Evidence Act 1950, ss. 8, 90A

For the appellant - Hamid Ismail; M/s Hamid & Co
For the respondent - Raja Zaizul Faridah Raja Zaharudin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] The appellant was charged with the following offence:

> Bahawa kamu pada 22 Disember 2003 di Pejabat Kesihatan Kawasan Beaufort, di dalam Daerah Beaufort, di dalam Negeri Sabah, sebagai seorang pegawai badan awam iaitu, Pembantu Tadbir N22 di Pejabat Kesihatan Beaufort, telah menggunakan jawatan kamu untuk mendapat suapan dengan mengambil suatu tindakan iaitu kamu memperakukan dalam Pesanan Kerajaan No. G 659084 yang dikeluarkan oleh Pejabat Kesihatan Beaufort kepada AST Enterprise untuk kerja-kerja penyelanggaraan dan Pembaikan Pagar di Klinik Kesihatan Meligan, Sipitang berjumlah RM39,995.00 bahawa kerja-kerja tersebut telah dilaksanakan dengan memuaskan, dan seterusnya kamu mendapat wang suapan sebanyak RM9,995.00 melalui cek Malayan Banking Berhad No. 544747 dari AST Enterprise, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 15 Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah seksyen 16 Akta yang sama (Undang-Undang Malaysia, Akta 575).

[2] The charge omitted to mention subsection 15(1) of the Anti Corruption Act 1997 ("the Act") but it is obvious that it relates to an offence under that subsection. In my view the omission had not occasioned any prejudice or injustice to the appellant as the particulars in the charge had given him sufficient notice of what he was charged with. He claimed trial and was found guilty by the learned Sessions Court Judge and sentenced to two years imprisonment and a fine of RM4,997 in default six months imprisonment.

[3] The prosecution case can be summarised as follows. Towards the end of 2003, Klinik Kesihatan Meligan Sipitang which came under the jurisdiction of the Beaufort Health Department applied for allocation to carry out repair and maintenance works for the fence at the Klinik ("the project"). Altogether there were five companies that purportedly submitted tenders for the project. They were AST Enterprise, Pemborong HLM, Multi Usaha Enterprise, Rahimah Kontraktor and IMS Kontraktor. By a unanimous decision of the Quotation Committee of the Beaufort Health Department ("the Quotation Committee") on 12 December 2003 the project was awarded to AST Enterprise who quoted the lowest price of RM39,995. The

members of the Quotation Committee were Dr. Noitie Lajani (PW19) as Chairperson, the appellant as Secretary and Medical Assistant Wan Hanapi (PW8) as Member. PW19 was also the Head of Department while the appellant the Chief Clerk. The Quotation Committee also agreed that AST Enterprise must be paid even though the project had yet to be completed. This was to avoid the allocation for the year 2003 from going to waste as such allocation must be utilised in 2003, which meant the contractor must be paid before the end of 2003. Pursuant to the decision of the Quotation Committee the appellant on 22 December 2003 signed the "PERAKUAN" column of Local Purchase Order No. G659084 ("the LPO") to certify that repair works for the fence had been satisfactorily carried out. This of course was untrue as the project had not been completed. It must be noted however that the charge does not allege that the certification was false. Therefore it is not part of the prosecution case that the appellant had certified a document that contained false material particulars with intent to mislead his principal. There is no dispute that when the appellant signed the LPO on 22 December 2003 he did so under the instruction of PW19 who was his superior and Head of department. This much was admitted by PW19 herself when she testified:

> I instructed Thomas Kandadi to sign the column PERAKUAN as payment had to be done and in order to process the payment voucher this column had to be signed to signify work had been done.

[4] PW19 in turn had so acted after consulting David Aswar (PW15), the Assistant Administrative Officer at the Development Unit of the Sabah Department of Health whose advice was that PW19 could proceed with payment provided the contractor could issue a letter of undertaking that the project would be completed before the end of the year. As it turned out no such letter of undertaking was ever produced by the prosecution during the trial.

[5] The offence under s. 15(1) of the Act with which the appellant was charged provides as follows:

> 15(1). Any officer of a public body who uses his office or position for any gratification shall be guilty of an offence.

[6] In my view there are three elements of the offence which the prosecution must prove beyond any reasonable doubt against the appellant, namely:

(1) that the appellant was an officer of a public body at the material time;

(2) that he used his position to obtain a gratification from AST Enterprise;

(3) that he received the gratification from AST Enterprise.

[7] Although s. 15(1) of the Act uses the word "uses" the offence lies in the misuse or abuse of such position. The first element poses no difficulty as there is sufficient proof that the appellant was a public officer attached to the Beaufort Health Department at the material time. As for the second and third elements the prosecution's case is that when the appellant signed the LPO on 22 December 2003 it was for the purpose of receiving a gratification from AST Enterprise. Evidence was led to show that about three months after he signed the LPO the appellant received a RM9,995 cheque from PW20 which he allegedly cashed on 21 April 2004.

[8] Did the appellant use his position for a gratification when he signed the LPO on 23 December 2003? In considering this point it must be borne in mind that the point in time to determine whether there was abuse of position is the time the appellant signed the LPO and not any other time because this is the time the charge alleges the appellant abused his position. Having regard to the nature of the offence and the evidence produced at the trial it is important in my view not to confuse the offence with the offence of accepting a gratification, a distinct offence under s. 11(a) of the Act with which the appellant was not charged. Gratification is defined by s. 2 of the Act to mean the following:

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, or any other similar advantage;

(b) any office, dignity, employment, contract of employment or services, and any agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

A (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

B (f) any other service or favour of any description, such as protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise of any right or any official power or duty; and

C

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);

D **[9]** The paragraph relevant to the present case is para (d). With regard to the use of public office for gratification subsection 15(2) of the Act presumes as follows:

For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office E or position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

F **[10]** This presumption applies against the appellant if there is evidence that he had a personal interest in signing the LPO. In her grounds of decision the learned Sessions Court Judge held the view that so long as the appellant was in a position to sign the LPO it mattered not if he had acted on his own or was under instruction to do so. Her reasoning appears at p. 228 of the G record of appeal, as follows:

In my judgment it is immaterial that the accused was instructed by PW19 to sign the certification column. I say this because in my opinion, the aim of section 15(1) of the Anti Corruption Act H 1997 is to strike at any act done by a public officer whereby he used his public position to obtain gratification. In other words the law aims to strike at the abuse by the accused from his act of certifying that the project had been completed to satisfaction. What is material is that the accused was in a position to make the certification, that he in fact made it (whether under instruction I or not) and then abused this position that he was in to obtain the gratification.

[11] In my view this is a misdirection because whether or not the appellant acted under the instruction of PW19 or had acted on his own is relevant to determine whether he had acted dishonestly and with corrupt motive when he signed the LPO. The offence under s. 15(1) of the Act is only committed when there is misuse or abuse of position and not otherwise. The evidence must show that the appellant's intention when he signed the LPO was to obtain a gratification from AST Enterprise.

[12] The undisputed evidence in this case however is that the decision to pay the contractor was the unanimous decision of the Quotation Committee and not the appellant's. It was the collective decision of the Quotation Committee of which the appellant was Secretary. When the appellant signed the LPO it was to follow up on the decision of the Quotation Committee and he did so on the instruction of PW19. On such facts can it be said that the appellant's act of signing the LPO was for the purpose of obtaining a gratification? I do not think so. As the Chief Clerk at the Beaufort Health Department it was his duty to certify the "PERAKUAN" column of the LPO after the decision was made by the Quotation Committee that payment must be made to the contractor. To hold as the learned judge did is to expose a subordinate officer to criminal action for carrying out the lawful orders of his superior. This cannot be the intention of Parliament in enacting s. 15(1) of the Act. The learned judge's conclusion that the appellant's intention was to obtain a gratification was obviously swayed by evidence of the appellant's subsequent conduct in asking for and receiving the RM9,995 cheque from PW20 in April 2004. Evidence of subsequent conduct is relevant under s. 8 of the Evidence Act 1950 ("the Evidence Act") but before criminal intent can be attributed to the appellant there must first be established a nexus between the RM9,995 and his alleged abuse of position. In other words it must be proved that at the time the appellant signed the LPO it was agreed that he would be given the RM9,995. In the absence of such evidence there can be no question of any criminal nexus between the RM9,995 and the appellant's act of signing the LPO.

[13] The prosecution relied on the testimony of Abdul Samat bin Tengah (PW20), the owner of AST Enterprise to prove that the RM9,995 was meant for the project. He was the person whom the prosecution alleged had given the RM9,995 cheque to the

appellant. But what really was the RM9,995 for? Was it for awarding the project to AST Enterprise or was it consideration for the appellant's act of signing the LPO as alleged? The charge alleges that it was for certifying in the LPO that works on the fence had been carried out satisfactorily. On both counts the appellant could not have had any personal interest as the decision to award the contract to AST Enterprise was not his decision. What is more damaging to the prosecution's case is PW20's admission that he had no knowledge about the project, did not know the appellant and had never bribed anyone to get payment for the project. Coming as it is from the prosecution's own witness this evidence effectively rebutts the presumption of corrupt motive under s. 42(1) of the Act without having to call upon the appellant to discharge the burden placed on him by that section. The implication of PW20's admission is that the appellant was not actuated by corrupt motive when he signed the LPO on 22 December 2003. PW20's evidence must be the truth because there is absolutely no evidence that before the appellant signed the LPO he had any dealings or discussed the project with PW20. All communication with PW20 was subsequent to the signing of the LPO. The question of issuing the cheques only arose after the RM39,995 was allegedly banked in into PW20's account. I say "allegedly" because there is no conclusive proof that the RM39,995 meant as payment for the project had in fact been banked in and if so by whom and when? The record of appeal at p. 104 shows that an attempt was made by the prosecution to produce as evidence through PW20 a computerised statement of account for account No. 0134101642 belonging to AST Enterprise (ID23) but upon objection by the defence on the ground that the preconditions for admission of the certificate under s. 90A of the Evidence Act 1950 had not been fulfilled it was ruled out by the learned judge. The statement of account remained a document for identification only and not proved at the conclusion of the trial. The prosecution had every opportunity to adduce evidence of compliance with s. 90A of the Evidence Act 1950 and to produce the relevant certificate as exhibit but chose not to. PW20's oral evidence on the matter is that after the appellant called him to enquire about the cheques he called Maybank Sipitang to confirm if the money had been banked in into his account. The bank confirmed that RM39,995 had been banked in. He then issued two cheques, one for the sum of RM28,000 in the name of

Gilbert Gisat (PW9) and the other for the sum of RM9,995 in the name of the appellant. He further testified that when the Bank Statement was sent to him he found that the balance in AST Enterprise's bank account was lesser. Lesser by how much PW20 did not say. No witness from the bank was called to confirm the status of PW20's account. Therefore PW20's evidence that he was told the RM39,995 had been banked in into his company's account is hearsay and ought to have been disregarded by the learned judge. It was the duty of the learned judge to disregard all inadmissible evidence regardless of whether there was objection to its admission or otherwise. If the learned judge had disregarded PW20's evidence on this point there would have been no evidence before her that the RM39,995 had in fact been banked in. It is interesting to note that the cheque for the RM39,995 issued by the Jabatan Akauntan Negara (JAN) and meant as payment for the project went missing during the investigation. When the Anti Corruption Agency asked for the cheque, Normala binti Hamzah (PW16) who was the Assistant Accountant at the JAN testified that all cheques issued by JAN Kota Kinabalu were from Alliance Bank but when she made enquiries with the bank she was told that the cheque had been given to JAN. The cheque however could not be traced at any of the JAN stores and was never produced at the trial. The fact that the cheque for that amount had been issued is not proof that the cheque had been banked in for payment. The learned judge however brushed aside this infirmity in the prosecution's case by saying that the cheque had been issued by JAN. With due respect the learned judge should not have trivialised the issue because if the RM39,995 had not been banked in the question arose as to where and from which source the gratification of RM9,995 came from, and for what.

[14] It must be emphasised that AST Enterprise never bid for the project. PW20, the owner of the company did not even know about the project, not until the appellant called him to enquire about the cheques. What was established beyond any doubt by the prosecution is that the tender documents purportedly submitted by AST Enterprise, Pemborong HLM, Multi Usaha Enterprise, Rahimah Kontraktor and IMS Kontraktor were all fakes. The fact is these five companies never submitted the quotations for the project. But who faked those tender documents? There is no evidence to pin point anyone. More importantly there

A is no evidence that the appellant was concerned in the scheme to defraud the Quotation Committee into awarding the project to AST Enterprise. If there had been such evidence the learned judge would have been perfectly entitled to find that the appellant's intention from the start was to gain financially from the B project. As it was no such evidence was adduced by the prosecution.

[15] As for the credibility of PW20 the learned judge found him to be an accomplice by "normal definition" but that by reason of C s. 44(1)(a)(ii) and (iii) of the Act he was not to be regarded as such. To appreciate the context of the learned judge's finding it is necessary to reproduce what she said on the point, as follows:

> What of the credibility of PW20? He was the person that had issued the cheque Exhibit P22 for the sum of RM9995 to the D accused and thereby, fits squarely within the category of those who are *participes criminis* in respect of the actual crime charged and thus an accomplice by the normal definition. However, by reason of section 44(1)(a)(ii) and (iii) of the Anti Corruption Act, 1997 he is not to be regarded as an accomplice by reason only E of him having given the gratification or been in any manner concerned in the commission of the offence.

[16] It is obvious that the learned judge found PW20 to be involved in the commission of the actual offence charged. In my view in the light of PW20's own admission (and by extension the F prosecution's) that he did not know about the project, did not know the appellant and did not bribe anyone to get payment for the project the question of him being an accomplice in respect of the offence charged does not arise. How could he be when he only came into the picture well after the alleged abuse of position G took place?

[17] Equally important is the question of whether the appellant had actually cashed the RM39,995 cheque. The learned judge found that the evidence of PW20 that he gave the RM9,995 H cheque to the appellant was corroborated by the evidence of two bank officers, namely Jofri bin Baharudin (PW12) and Taiming bin Rajin @ Lajin (PW13). PW13's testimony is that it was the appellant who cashed the cheque on 21 April 2004. But it is obvious that he came to this conclusion based on the name, I identification card number and the signature appearing at the back of the cheque given to him. This is what he said:

This cheque is in the name of Thomas Kandadi. I did not know Thomas Kandadi. The cheque is for the amount of RM9,995.00. This cheque was issued by AST Enterprise. This cheque was cashed in by Thomas Kandadi. I know it was Thomas Kandadi who cashed in this cheque based on his name, IC No. and his signature at the back of his cheque and furthermore I would ask the customer to show his IC. Thomas Kandadi gave his IC when he cashed in the cheque.

[18] Since PW13 was not familiar with the appellant clearly he would not be able to confirm if it was the appellant and no one else who cashed the cheque. For the same reason he would not be able to confirm if it was the appellant who gave him the identification card bearing the name of Thomas Kandadi. Furthermore none of the witnesses called by the prosecution identified the signature at the back of the cheque as that belonging to the appellant. The fact that the cheque was given to the appellant by PW20, even if true cannot lead to an inescapable inference that it was the appellant who cashed it. That is not the only reasonable inference capable of being drawn against him. The learned judge was therefore wrong in finding that it was the appellant who produced the identity card, signed at the back of the cheque and cashed the cheque on 21 April 2004. In so finding she had accepted PW13's evidence lock, stock and barrel without appreciating that PW13 was relying on a document and not on visual identification to identify the appellant as the person who cashed the cheque on 21 April 2004. The same goes with the evidence of the other bank officer Jofri bin Baharudin (PW12). The doubt on the identity of the person who cashed the RM9,995 cheque raises a doubt as to whether it was actually given to him. This doubt must be resolved in favour of the appellant.

[19] For reasons stated above I am of the view that the learned judge was wrong in finding that the prosecution had established a *prima facie* case against the appellant. In the circumstances the conviction was set aside and the appellant ordered to be acquitted and discharged and the fine if paid be refunded to him.